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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, *et al.*, and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

—against—

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

THE QUESTION PRESENTED BY APPELLANTS MERIT PLENARY CONSIDERATION 1

A. Appellee Erroneously Suggests Appellants Have No Remedy Under State Law, and That Plenary Consideration Would Prove an Academic Exercise 1

1. Appellants Have a Private Cause of Action Under Labor Law § 198-c 1

2. Appellants Have Valid Claims at Common Law 2

3. Appellants Are Entitled to Payroll and Vacation Severance Under the Terms of the Company's Policy Manual 3

B. Appellee Misrepresents Both Federal Decisional Law and Administrative Regulations 4

1. This Is Not Just a Severance Pay Case 4

2. This Is a Case About What Constitutes a Plan 6

C. Review by Way of the Supreme Court's Appellate Jurisdiction Is Plainly Appropriate 8

CONCLUSION 10

APPENDIX:

Map Reflecting Distribution of States Adopting Appellants' Position Within the Various Federal Circuits

Table of Authorities

Cases: PAGE

Barry v. *Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707 (Mass. 1985) 5

Donovan v. *Dillingham*, 688 F.2d 1367 (11th Cir. 1982) 7

Gillette v. *Heinrich Motors, Inc.*, 55 A.D.2d 841, 390 N.Y.S.2d 330, *aff'd* 44 N.Y.2d 661, 405 N.Y.S.2d 33, 376 N.E.2d 194 (1978) 3

Ingrassia v. *Shell Oil Co.*, 394 F.Supp. 875 (S.D.N.Y. 1975) 3

In re W.T. Grant Co., 474 F.Supp. 788 (S.D.N.Y. 1979), *aff'd* 620 F.2d 319 (2nd Cir.), *cert. denied*, 446 U.S. 983 (1980) 3

Jewish Nat'l Fund v. *Jack Garland*, No. 83 Civ. 7796 (S.D.N.Y. January 3, 1985) 3

Local 926 Intern. Union of Oper. Engineers v. *Jones*, 460 U.S. 669 (1983) 9

Malone v. *White Motor Corp.*, 435 U.S. 497 (1978) 9

Morschauser v. *American News Co.*, 6 A.D.2d 1028, 178 N.Y.S.2d 279 (1st Dept. 1958) 3

Murphy v. *Happenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982) 7, 8

Nachman Corporation v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980) 7

Patrowich v. *Chemical Bank & Harold D. Corney*, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984) 1

Scott v. *Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985) 7

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 9

Stoganovic v. *Dinolfo*, 61 N.Y.2d 812, 473 N.Y.S.2d 972, 462 N.E.2d 149 (1984), *aff'g*, 92 A.D.2d 729, 461 N.Y.S.2d 121 (4th Dept. 1983) 1

PAGE

Turski v. *Chiesa*, 58 A.D.2d 828, 396 N.Y.S.2d 667 (2nd Dept. 1977) 3

Wanhope v. *Press Co.*, 256 A.D. 433, 10 N.Y.S.2d 797, *aff'd* 281 N.Y. 607, 22 N.E.2d 171 (1939) 3

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. 5

Section 1002 ..... 5, 6

N.Y. Labor Law:

Section 196b 2

Section 197 2

Section 198a 1

Section 198c ..... *passim*

28 U.S.C. § 1254(2) 9

28 U.S.C. § 1257(2) 9

29 U.S.C. § 186(c), LMRA, Section 302(c) 5, 6

Other Authorities:

29 C.F.R. § 2510.3-1(b) 4, 5

40 Fed. Reg. 34527 (Aug. 15, 1975) 6

THE QUESTIONS PRESENTED BY THE APPELLANTS MERIT PLENARY CONSIDERATION

Appellants reply jointly to the appellee's numerous misstatements of fact and law.

A. *Appellee Erroneously Suggests Appellants Have No Remedy Under State Law, and That Plenary Consideration Would Prove an Academic Exercise.*

Appellee would have this Court believe that if it were to find that state law, and not ERISA, applies to the provisions of a simple employer personnel policy or handbook, appellants would be without a remedy, both in fact and in law.[1] Nothing could be further from the truth.

1. Appellants Have a Private Cause of Action Under New York Labor Law § 198-c.

Appellee states that "the New York Court of Appeals [has] held that Section 198-c does not support a private right of action such as the individual appellants asserted in their complaint." (Motion at 8-9, 16-17). This contention is based upon nothing but wishful thinking.

The Court of Appeals has never held that there is no private cause of action under § 198-c; rather, it has pointed out that there is no private cause of action *against individual officers or agents of a corporation.* ("We have recently held that the provisions of Section 198-a subjecting *corporate officers* to criminal sanctions for violation of the article indicates a legislative intent that *they not* be subject to civil liability.") *Patrowich* v. *Chemical Bank and Harold D. Corney,* 63 N.Y.2d 541, 543, 483 N.Y.S.2d 659, 661, 473 N.E.2d 11 (1984). (Emphasis added.) The recent decision referred to is *Stoganovic* v. *Dinolfo,* 61 N.Y.2d

[1] Although appellee acknowledges at page 2 of its Motion to Dismiss or Affirm (hereinafter "Motion") that the appellant Commissioner entered orders under New York Labor Law § 198-c

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812, 473 N.Y.S.2d 972, 462 N.E.2d 149 (1984), *aff'g* 92 A.D.2d 729, 461 N.Y.S.2d 121 (4th Dept. 1983).[2]

Since it is only against the corporate employer and *not* against any of its officers or agents that the appellants have stated claims (See CA-9, 13-14),[3] their claims under the New York Labor Law are unassailable.[4]

2. Appellants Have Valid Claims at Common Law.

It has long been recognized under New York law that an employer's promise to provide benefits is *enforceable* at common law.[5] This is so whether the promise is an

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awarding the individual appellants their severance pay, appellee then seems to forget this fact when, at pages 8 and 16, it argues that the appellants have no remedy under state law. It is the invalidation of the state law under which the Commissioner's orders were issued which appellants challenge in these appeals.

[2] In *Stoganovic, supra,* 461 N.Y.S.2d at 122, the court noted that there are several provisions of the New York Labor Law, including sections 197 and 198, which recognize the propriety of implying a civil cause of action against a corporate employer for the recovery of wages, but *no* provisions of the Labor Law which "refer to civil actions for the recovery of wages against officers or agents of corporations." The former are authorized, therefore, and the latter not. Moreover, under N.Y. Labor Law § 196(b), the Commissioner is empowered to file suits *on behalf of* employees. *Cf.* Motion at 8 n.*.

[3] Citations to the Joint Appendix before the Second Circuit are designated as "(CA—)".

[4] It follows that the appellee's contention that appellants "have no standing to appeal under Section 1254(2)", Motion at 8, must also fail. *See* further discussion of jurisdictional question, *post,* at pp. 8-9.

[5] The four appellate division decisions the appellee cites in support of the opposite proposition (Motion at 17 n.*) are totally inapposite because, in each, what the plaintiffs were attempting to enforce were not *benefit* provisions, but representations regarding limitations which might be imposed upon an employer's right to discharge. Given the time-honored doctrine of "at-will employment", it would have been in derogation of the common law to

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oral or written one, and whether it is embodied in a policy, manual or more formal contract. Indeed, this principle has been recognized not only by the New York Court of Appeals, but by virtually every appellate division and federal court to apply New York law on the question for the last fifty years.[6]

Since appellants' claims are in complete conformity with this principle, their common law claims, like their statutory claims, are unassailable.

3. Appellants Are Entitled to Payroll and Vacation Severance Under the Terms of the Company's Policy Manual.

The district court's rejection of Burlington's motion for summary judgment lays to rest, at this stage of the pro-

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recognize the existence of an implied agreement to terminate only for cause, and most courts have refused to do so. No such impediment exists here, however, where employees seek to enforce explicit promises to provide benefits in the event of discharge rather than implied promises not to discharge without cause.

[6] *See, e.g., Ingrassia* v. *Shell Oil Co.*, 394 F.Supp. 875 (S.D.N.Y. 1975) (oral and written promises to pay severance pay enforceable; New York law applied); *Jewish National Fund* v. *Jack Garland,* No. 83 Civ. 7796 (S.D.N.Y. January 3, 1985) (severance benefits to be awarded; dispute as to whether payment should be calculated on basis of personnel practices agreement or lifetime contract); *In re W. T. Grant Co.,* 474 F.Supp. 788 (S.D.N.Y. 1979), *aff'd* 620 F.2d 319 (2nd Cir.), *cert. den'd,* 446 U.S. 983 (1980) (severance pay claims under store manual, personnel manual, and collective bargaining agreements entitled to priority as expenses of administration of the bankrupt's estate); *Gillette* v. *Heinrich Motors, Inc.,* 55 A.D.2d 841, 390 N.Y.S.2d 330, *aff'd* 44 N.Y.2d 661, 405 N.Y.S.2d 33, 376 N.E.2d 194 (1978) (right to salary continuation benefits described in disability plan held enforceable); *Turski* v. *Chiesa,* 58 A.D.2d 828, 396 N.Y.S.2d 667 (2nd Dept. 1977) (benefits due under profit-sharing arrangement enforceable); *Morschauser* v. *American News Co.,* 6 A.D.2d 1028, 178 N.Y.S.2d 279 (1st Dept. 1958) (oral representation that it was the company's practice to pay severance pay enforceable); *Wanhope* v. *Press Co.,* 256 A.D. 433, 10 N.Y.S.2d 797, *aff'd* 281 N.Y. 607, 22 N.E.2d 171 (1939) (written severance and vacation pay provisions enforceable).

ceedings, appellee's claim that appellants are excluded from Burlington's severance policy because many were subsequently employed by a new employer. (Motion at 3.)

The policy for salaried employees in effect when appellants were terminated stated that "[e]mployees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company." (A23).[7]

It was not until mid-1983, nearly a year and a half after appellants were terminated, that language disqualifying employees who are involved in a plant or division sale and "have the opportunity to continue their employment with a successor employer" was inserted in the severance policy. The individual appellants cannot be said to have been affected by this belated amendment.

B. *Appellee Misrepresents Federal Decisional Law and Administrative Regulation.*

1. This Is Not Just a Severance Pay Case.

In a last-minute attempt to make the resolution of the issue presented herein appear less important, appellee suggests for the first time that the question—*what is an employee benefit plan?*—can easily be resolved by merely looking to the Department of Labor's "payroll practices" regulation, 29 C.F.R. § 2510.3-1(b). (Motion at 12-14).

Thus, according to the appellee's reading of the regulation, the line of demarcation is clear: personnel policies

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[7] Termination was defined as "a complete separation from the Company's payroll." (CA 358). It was "involuntary" if it was not at the request of the employee and not the result of willful misconduct. (A23, CA-367). The only full-time employees excluded from the policy, and thus ineligible to receive benefits, were those who were either "terminated because of early retirement, mandatory retirement, death, misbehavior, lack of cooperation, willful negligence, or other unfriendly acts against the Company or towards its management," (A24) or "re-employ[ed] *by the Company*" after their separation from the payroll. (CA-353, 354. (Emphasis added).

and payroll practices expressly mentioned in the regulation, such as personnel policies and payroll practices that provide for the payment of vacation pay, holiday pay, disability pay, sick leave allowances and benefits associated with other types of medical leave, are *not* welfare plans within the meaning of the Act, while a personnel policy or payroll practice not expressly mentioned, such as one that provides for the payment of *severance* benefits *is* a welfare plan. (*Id.*)

As the Supreme Judicial Court of Massachusetts has pointed out:

> Section 1002(1) of 29 U.S.C. defines any employer-established program which provides vacation benefits as an employee welfare benefit plan . . . [The] United States Department of Labor, however, states that payments of compensation out of an employer's general assets while an employee is on vacation are not made pursuant to an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(b)(3) (1984).

Barry v. *Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707, 712 (Mass. 1985). Thus, if, as the appellee has contended and as the district and circuit court decisions upon which it relies have concluded, a simple personnel policy or payroll practice is a *plan* or *program* within the meaning of the Act, then the Department of Labor's regulation exempting payroll practices from ERISA coverage "is at clear odds with language of the statute itself and an invalid arrogation of power by the Department.[8] *Barry, supra,* 478 N.E.2d at 712.

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[8] Appellee cannot escape the fact that the Department of Labor's "list" of excluded practices includes many benefits that are explicitly referred to in ERISA, to wit, benefits in the event of sickness, accident or disability, vacation benefits, holiday pay, severance pay, and benefits associated with training programs. *Cf.* 29 C.F.R. § 2510.3-1(b)(2) and (3) with 29 U.S.C. § 1002(1) and § 186(c).

The appellee cannot have it both ways. Either anything and everything is a "plan" within the meaning of the Act, in which case all policies, practices and personnel provisions which provide one or another of the benefits listed in 29 U.S.C. § 1002(1) are ERISA-covered "welfare plans," *including* the policies and practices referred to in the regulation, or no payroll policies, practices and personnel provisions are plans within the meaning of the Act, *regardless* of the type of benefit provided. The middle ground which the appellee seeks to strike for the first time in its Motion to Affirm is untenable. The statute does not admit of the making of any distinctions based on the type of benefit involved between holiday, vacation, sick leave and disability benefit arrangements, on the one hand, and severance benefit arrangements, on the other.[9]

Thus, far from having put the questions posed by appellants to rest, the Department of Labor's regulation only serves to underscore the need for a definitive resolution as to the meaning of ERISA's basic terms.

2. This Is a Case About What Constitutes a Plan.

Appellee's argument that this Court should respect the "consistency" with which other courts have avoided resolving the question of what constitutes a plan requires no elaborate analysis. Of the nineteen cases cited in the Motion to Dismiss as having reached the same result as the Court below, only two—by appellee's own count—have even addressed the definitional issue. (Motion at 15.) Even that number is exaggerated.

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[9] Indeed, if the statute can be read to permit of any distinction at all, it is the opposite of that argued for by the appellee. Thus, rather than "most, if not all, types of unfunded benefit arrangements, other than for the payment of severance benefits, . . . fall[ing] outside the coverage of ERISA," Motion at 13n.*, it would appear that severance benefits may be one of the few types of benefits that are only covered when provided through a pooled and funded program. 40 Fed. Reg. 34527 (Aug. 15, 1975) ("Section 302(c) of the LMRA refers only to funded programs.")

While *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982) did search the statute for the meaning of the term "plan," it did so in a context so different[10] that its answer, arrived at with difficulty, offers little guidance here. *Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985), while more factually apposite, fails to engage in the analytical task appellants urge upon this Court, and relies instead upon quotations from *Donovan* for its conclusion that the severance benefits at issue in *Scott* are provided by means of a plan.

Appellee's other efforts to prevent plenary consideration of the definitional question may be dismissed with the following observations:

1. This Court has never ruled on the question.
2. The first circuit court which tried to answer the question foundered on the statutory tautology,[11] and the second followed it.[12]
3. The case appellee relies upon to dispute the applicability of *Nachman* in fact proves it.[13]

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[10] The question in *Donovan* was whether insurance programs established by third parties were "plans" giving rise to fiduciary duties. An affirmative answer was finally arrived at—on re-argument, after the circuit decided to reverse the district court and previously controlling law in the circuit.

[11] "Not so well defined [as other statutory terms] are the first two pre-requisites: 'plan, fund, or program' and 'established or maintained.' Commentators and courts define 'plan, fund or program' by synonym . . . but do not specify the prerequisites of a 'plan, fund or program.'" *Donovan* v. *Dillingham,* 688 F.2d 1367, 1372 (11th Cir. 1982).

[12] " 'ERISA does not contain a clear definition of the word plan.' The definition of "employee welfare benefit plan' itself uses the word 'plan' . . . "). *Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985).

[13] Appellee mischaracterizes *Murphy* v. *Heppenstall Co.,* 635 F.2d 233 (3d Cir. 1980), *cert. denied,* 454 U.S. 1142 (1982). After

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For appellee to characterize the question of defining the terms upon which a lengthy, complex and comprehensive statutory/regulatory scheme is predicated as *insubstantial* is absurd. Even if there were little conflict among the federal authorities on the question, the conflict between the circuits and the states can not be ignored. *See* Appendix, reflecting distribution of states adopting appellants' position within the various federal circuits, attached hereto. Given the rampant confusion regarding the scope of the pre-empted field, *cf.* Appendices B and D to Appellant Gilbert's Jurisdictional Statement, the acknowledged difficulty of deciphering the terms most basic to ERISA, *see* text at pp. 6-7, *ante,* and the effect of continued uncertainty upon thousands, if not millions of workers, employers, courts, and administrative agencies, it is hard to imagine what constructive purpose could be served by prolonging the confusion.

C. *Review by Way of the Supreme Court's Appellate Jurisdiction Is Plainly Appropriate.*

The individual appellants herein claimed a right to severance pay by virtue of Section 198-c; the Commissioner intervened asserting that Burlington should be ordered to pay severance pay based on § 198-c, and Burlington moved to dismiss these claims on the ground that § 198-c was preempted by federal law. In response, both the district and circuit courts squarely held that § 198-c was pre-empted, and not merely that an exercise of authority without reference to any statute was invalid.

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noting that ERISA only pre-empts state laws, the court goes on to conclude that there is no incompatibility between liability against a plan under ERISA and direct contractual liability against an employer. *Murphy, supra,* 635 F.2d at 237-39. Indeed, the opinion not only recognizes the distinction between plan liability and direct employer liability, it also recognizes the underlying distinction between *plans* and *employers. Id.* at 326-37.

As this Court acknowledged in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), the paradigm of cases requiring review under 28 U.S.C. § 1254(2) is *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978). Review by way of appeal rather than *certiorari* is proper in this case for the same reasons it was in *Malone*. A state statute, found to have been pre-empted by federal law, has been invalidated and its continued enforcement rendered unconstitutional because it was found repugnant to federal law under the Supremacy Clause. "It is uncontested that whether the . . . statute is invalid under the Supremacy Clause depends upon the [pre-emptive] intent of Congress." *Malone*, 435 U.S. at 504.[14]

In none of the cases relied upon by Burlington, unlike in these appeals, was the validity of a state statute either presented or decided by the courts. As this Court stated in *Silkwood*, the court of appeals "did not purport to rule on the constitutionality" of the Oklahoma statute. It "did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their briefs." *Id.*, —— U.S. at ——, 104 S.Ct. at 621.

Burlington's only remaining argument seems to be that Section 198-c is not invalidated because it may continue to be applied to claims for benefits other than severance pay. (*But see* Point B(1), *ante*). Since this Court has held that appellate jurisdiction is proper even where a state statute has been invalidated only as applied to the

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[14] *Accord, Local 926 Intern. Union of Oper. Engineers* v. *Jones*, 460 U.S. 669, 675 n.7 (1983), where, speaking of jurisdiction under 28 U.S.C. § 1257(2), this Court distinguished between appeals "as of right when a state statute is challenged . . . as being repugnant to the laws of the United States . . ." (*id.*) and appeals based upon rejection of common law causes of action. The appeal was dismissed and *certiorari* granted in *Local 926* once appellee abandoned the claim that the state court had relied upon a Georgia statute.

circumstances of a particular case, this argument is without merit.[15]

CONCLUSION

For the reasons stated, appellee's Motion to Dismiss or Affirm should be denied and the issues presented on appeal given plenary consideration.

Respectfully submitted,

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Civil Liberties Committee

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[15] Furthermore, under the logic of the decisions of the courts below, virtually any employer agreement to provide benefits of a type enumerated in § 1002(1) is a "welfare benefit plan" within the meaning of ERISA. Thus, virtually every effort to enforce New York Labor Law § 198-c would be subject to injunction under ERISA's pre-emption provision, as would efforts to enforce the laws of the 35 other states that have joined as *amici* on these issues.

Source, West's Federal Reporter (St. Paul, Minnesota 1985)

Legend: shaded states are those which have joined in an amicus brief in support of appellants' position.